

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

October 23, 2007 Session

STATE OF TENNESSEE v. JERRIE BRYANT

Direct Appeal from the Circuit Court for Van Buren County
No. 1959-F Larry B. Stanley, Jr., Judge

No. M2007-02057-CCA-R3-CD - Filed February 20, 2008

A Van Buren County jury convicted the Defendant, Jerrie Bryant, of one count of second degree murder and one count of abuse of a corpse. The trial court sentenced her to twenty-two years in prison. The Defendants appeals, contending: (1) the evidence is insufficient to sustain either of her convictions; (2) the trial court erred when it failed to charge the jury on facilitation; and (3) the trial court erred when sentencing her. After a thorough review, we affirm the Defendant's convictions, but we vacate her sentences, and we remand the case for proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part,
Vacated in Part, and Remanded**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J.C. McLIN, JJ., joined.

J. Al Johnson (on appeal), Spencer, Tennessee, and Jerry Brandon (at trial), Murfreesboro, Tennessee, for the Appellant, Jerrie Bryant.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Benjamin A. Ball, Assistant Attorney General; Lisa Zavagiannis, District Attorney General; Dale Potter and Larry Bryant, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION
I. Facts

This case arises from the killing of Furlon Bryant¹ in June 2005, whose body was discovered on June 13, 2005. The Van Buren County Grand Jury indicted the Defendant on charges of first degree murder and abuse of a corpse in relation to this killing. At her trial on

¹The Defendant asserts that the victim's name was misspelled in the trial transcript as Ferlin when it is actually spelled "Furlon."

these charges, the following evidence was presented:²

Mary Jane Bell, a loan officer for First National Bank in McMinnville, testified the Defendant requested a real estate loan for \$35,000 from her on February 4, 2005. The Defendant said that she and her husband were divorcing and that the loan would be used to buy his interest in their house. The Defendant's loan application was approved that day, but she never returned to complete the loan. When Bell called the Defendant to inquire about this, the Defendant said her divorce had been postponed, and she would call when she needed the loan. On cross-examination, Bell said the bank had extended loans to the Defendant before, and the Defendant always paid them back in accordance with the terms of the loan. Bell agreed that she told the Defendant she would be approved for the loan as long as the house appraised for at least \$70,000.

Kenny Moore testified he lived near the Bryant residence, and, on a Monday, June 5, or Tuesday, June 6, 2005, he saw the victim and the Defendant leaving in the victim's truck around lunchtime. Later that evening, he saw the Defendant leaving by herself in the victim's truck. He waived to her, but she did not waive back at him. Moore had lived near the Bryants for ten years, and he had never seen the Defendant drive the victim's truck. Moore then identified a picture of him taken around that time that showed in the background smoke coming from the Bryants' property. Later that week, on Wednesday, he saw the victim's truck parked on the hill.

Willie Pack, the victim's neighbor, recalled that, on Monday, June 5, 2005, he was working in his garden at around noon when his friend, Bill Watts, came by for lunch. As the two were eating on the porch, he heard around twenty to twenty-five rifle shots. He looked but did not see anything. On Tuesday, June 6, 2005, he was leaving to go to church around 6:00 or 6:30 p.m., and he saw smoke behind the little barn at the Bryants' home. He thought it was odd that someone was trying to burn something because the ground was so wet from rain. Sometime later that week, Pack estimated maybe Wednesday, the Defendant asked him where she could borrow \$50,000, saying that the victim would move out if she gave him \$50,000. Pack recalled a previous occasion when the Defendant told him that she made the mistake of leaving her house once before and that she would never do that again. On cross-examination, Pack agreed that the shooting he heard sounded like someone was target practicing because he heard several shots bunched together and then a pause as if someone was reloading the gun and then several more shots. Pack agreed that he did not know who was at the house at the time he heard the shots or saw the smoke. Pack testified that he had seen a dark large "camouflage looking" truck go around behind the back of the Bryants' house, which he found odd. Further, on Wednesday, June 7, 2005, he heard several voices coming from the Bryants' house during the night and saw a light flickering at their house. Another neighbor found the victim's truck the following day.

Earl Ramsey McCoy testified he had known the victim all of his life and the Defendant for approximately twenty-five years. He and the Defendant began having an affair in 2004, and McCoy felt he concealed the affair better than the Defendant. McCoy recalled that in May 2005 the Defendant told him that she and the victim had divorced, and she was a "free woman." He

²We present this evidence in chronological order rather than in the order it was presented at trial.

made it clear that he did not intend to leave his wife for her.

On Monday, June 6, 2005, McCoy was planting a garden when the Defendant, who was walking, appeared at the end of the gate. He asked her what she was doing, and she said she was walking and went farther than she realized. She asked McCoy to take her back to her car, and he complied. McCoy told the Defendant that he could not stay, and the Defendant got angry with him. He said that he had ridden horses with another woman the day before, and the Defendant said "you can spend six (6) hours with that . . . fat bitch, but you can't spend fifteen (15) minutes with me." McCoy apologized but said he had to go back and work. McCoy said that on Thursday, June 9, 2005, the Defendant drove to his farm and told him that she had been to court, and he offered her advice about getting an attorney to assist her in having her house auctioned. The Defendant told McCoy that the victim was going to sell her his half of their marital house for \$35,000 and that he left for Montana with no plans to return. On cross-examination, McCoy testified that the victim had been suspicious of him and the Defendant for some time. After the victim learned about the affair, he talked to McCoy, and the two had what McCoy described as a normal conversation with neither of them getting upset. McCoy agreed he kept a gun in his truck but claimed it was only for shooting coyotes.

Two witnesses saw the Defendant purchasing gas at the Highway 30 Market, where the Defendant also worked. Freda Womack, who worked at the gas station, saw the Defendant in the store purchasing gas on the morning of June 6, 2005. Later that day, the Defendant returned and purchased more gas, saying that she was going to mow her yard. On cross-examination, Womack testified it was not unusual for the Defendant to purchase \$4.00 or \$5.00 worth of gas. Shane Thomas, the owner of the Highway 30 Market, recalled that the Monday before the victim was found, he saw the Defendant in the store at about 4:50 a.m purchasing \$5.00 worth of gas, a gallon of Purex, and a container of Spic & Span. She told Thomas that she was going to clean her house before she went to work. Thomas described the Defendant as having on baggy jogging pants, wearing no make up, and looking like she had just awoken. On June 8, 2005, he saw the Defendant in the store again talking to Willie Pack about trying to buy the victim's half of their home. Thomas asked the Defendant where the victim was, and the Defendant "shrugged her shoulders and switched [the conversation to] something else." Thomas testified he saw the Defendant in the market almost every day that week. On cross-examination, Thomas acknowledged that he knew that the victim purchased a .22 Remington rifle shortly before the victim disappeared.

Robin Mooneyham testified she was best friends with the victim's and the Defendant's daughter, Amanda. In June 2005, she worked at the BP gas station in Piney, which was about eight miles from the Defendant's residence. She estimated that the Highway 30 Market was approximately a mile and a half from the Defendant's home. On Tuesday, June 7, 2005, Mooneyham saw the Defendant at her BP station purchasing \$10.00 of gasoline. She was driving the victim's Dodge truck, before which Mooneyham had never seen her drive. Mooneyham knew that the victim and the Defendant had recently been divorced and that the two were still arguing over ownership of the house.

Manuel Mooneyham testified that, during the early part of June 2005, he saw a truck

parked at his brother's house at around 6:00 a.m., which was unusual. He called his brother, Monroe Mooneyham, and told him about the truck. Monroe Mooneyham testified that the last time he saw the victim was about a week before his disappearance when the victim borrowed \$100.00 from Mooneyham. Monroe Mooneyham said Manuel called him and told him that a truck was parked on his property. Monroe was out of town and saw the victim's truck upon his return. He observed that the truck looked as if it had been parked in that spot for a while. The driver's side window was about halfway down, and it had rained that day, so there was water in the back of the truck. Mooneyham looked for the victim, thinking he may be nearby, but did not see him. He went home and called the Bryants' residence, and Amanda answered and told him that she had not seen the victim in a couple of days. Mooneyham told her about the truck, and Amanda met him to look at the truck. While they looked at the truck, the Defendant drove by at least three times in her maroon car. Mooneyham had never seen the Defendant drive the victim's truck. After discovering the truck, Amanda called her sisters, and eventually the police came to investigate the truck. On the following Sunday, Mooneyham assisted deputies looking on his and the Bryants' property for the victim, but they did not find him. While looking, he detected a "foul" odor, and one of the deputies told him that a snake was hanging in some wire or brush.

On cross-examination, Mooneyham said he found the victim's truck in an area clearly visible from the road. He said that had someone wanted to hide the truck they could have easily driven further onto the property, which led to a large field. He agreed that the victim occasionally hunted on the property.

Larry Sullivan testified that he knew the Defendant and that he saw Monroe Mooneyham two or three weeks before the victim's death. He said that the victim was "out of money" and came to his house. The two then went to Robinson's grocery where they saw Mooneyham. The victim borrowed \$100.00 from Mooneyham. Sullivan said he last saw the victim on Monday, before the victim disappeared. The victim was at Sullivan's house, and Sullivan described the Defendant as acting normal. On cross-examination, Sullivan said he lived near Danny Bentley, and Bentley would sometimes come to his home. Sullivan said that he was present when the victim talked about going to Montana and that, if the victim went, Sullivan was going to go with him. On redirect examination, Sullivan said there was no set departure date for Montana.

Patricia Messenger testified that she employed the Defendant for six years to clean her house, and Messenger always furnished the cleaning supplies. The week that the victim disappeared, the Defendant was supposed to clean her house on Tuesday, June 7, 2005, but she never arrived. Messenger saw the Defendant on Wednesday around noon at Wal-Mart. The Defendant honked her horn at Messenger, waved, and then came over to her to have a short conversation. The Defendant told her that she had been cleaning for another client, Jo Cawthon, and that she was going into Wal-Mart to purchase supplies. She did not mention any plans that she had for that afternoon. Messenger described the Defendant as looking tired, and the Defendant said she had been sick.

Messenger was aware that the Defendant and the victim recently divorced. The Defendant told her that the divorce decree ordered the house to be split fifty-fifty, and the

Defendant seemed happy about that fact. Leading up to the divorce, the Defendant had discussed the situation with Messenger, and she told Messenger that she was not having an affair but that the victim was saying that to cause trouble for her. Messenger later discovered that the Defendant, whom she considered a good friend, was in fact having an affair. Messenger recalled one time when the Defendant told her that she would get angry and would not remember some of the things that she did.

On cross-examination, Messenger said the Defendant had always done a good job for her, and she described the Defendant as “a good Christian girl.” The Defendant did not smoke, drink, or curse. She dressed appropriately, and Messenger trusted her. Messenger said she and the Defendant were good friends, and they would workout at night together at the YMCA. She never saw the Defendant flirt or talk to another man at the YMCA. Messenger encouraged the Defendant to lose weight, which the Defendant did. Messenger recalled that, when they finished working out at night, they would sometimes go to Wal-Mart together. Messenger testified that, if the Defendant was sick, she would not want the Defendant to come to her home because her immune system was poor.

Messenger recalled a time that she took the Defendant to Women in Crisis, and she saw marks on the Defendant’s back and arms and the Defendant’s blackened eye. After being at Women in Crisis, the Defendant moved in with Messenger for around two months, and then Messenger helped her find a little place to rent. Messenger also testified that Larry Sullivan came to her house, but her husband told him to leave. The victim made threatening phone calls to her, which she reported to the sheriff. The sheriff told her that she would have to go back to the sheriff in her home county and get a warrant from him, and the sheriff would serve it on the victim. On redirect examination, Messenger seemed to contradict her earlier testimony by saying that the victim never threatened her, but he blamed her for his divorce.

Jo Cawthon testified she met the Defendant at the “Y” in Sparta, sometime after which the Defendant began cleaning Cawthon’s house. She said that she furnished the cleaning supplies for the Defendant to use and that the Defendant cleaned her house on June 8, 2005. The Defendant arrived at around 10:00 a.m., which was normal. The Defendant stayed for two to three hours, and Cawthon requested that the Defendant stay longer to help her clean the windows. The Defendant told Cawthon that she had an appointment with her attorney to discuss whether she should pay her husband half of what he wanted for the house or have the house appraised. She told Cawthon that she would return the next day, but she never did. Cawthon had not spoken with her since that day. On cross-examination, Cawthon said that she never saw the Defendant trying to “pick up” men, and she described the Defendant as acting “very professional.” She said she trusted the Defendant “very much.” Cawthon said the day the Defendant came to clean her house, she acted perfectly normal.

Emma Scott testified that the Defendant was her mother, and, while the victim was not her biological father, he had lived with them since she was two years old. Scott testified that the victim was like a father to her, he was good to her, and he was always there for her. She kept in touch with the victim up to the time of his death, but she had not spoken to the Defendant in over a year. Scott said that, at the time of the victim’s death, he and her mother were recently

divorced and still contesting who would retain their marital home.

Scott recalled that she saw the victim two or three times per week, and she last saw the victim alive on the Friday before his death when he loaned her his lawnmower. She did not hear from him the following week, which was unusual, but she was not concerned, thinking he was trying to reconcile with her mother. On Thursday, June 9, 2005, her step-sister, Pam McDonald, called her and said that she had not seen the victim either. The two went to look for the victim's truck, and they found it down the road from the victim's marital home at another house. When she saw the truck, she noticed two things: the window was left open despite that it was raining; and the seat was pushed forward as if someone short had driven the truck.

Scott testified that on June 10, 2005, around 5:00 or 6:00 p.m., she heard over her EMS scanner that there was a problem at her parents' home. She went there, where she saw her mother being placed into an ambulance. She noticed that the little door in the basement that led under the house was open and that the gun, a .22 rifle, was standing up between the washer and dryer. Shells were lying on top of the washer and dryer and on the floor; the clip was lying on the dryer. Scott went to see her mother in the hospital, and her mother told her that she was "sorry." Scott assumed that her mother was apologizing for their not speaking in over a year. While in the hospital, the Defendant, who only recognized Scott at times, kept saying "I shot the gun one time." She also said, "[H]e shot the gun twice by my head, so I shot him." While in the hospital, the Defendant hallucinated and told Scott to look at her neck because a snake had been biting her on the neck. Scott said that the Defendant said this "before her mind c[a]me back to her." The Defendant admitted she burned the old couch that they found in the burn pile.

On Sunday, June 12, 2005, Scott went back to the victim's home to try to discover clues to help find the victim. Scott's sister, Amanda, recalled that the Defendant had burned an old couch, and Scott went to the burn pile with Amanda and Amanda's boyfriend, Chad Turpin, and others. In the pile, they found the victim's pants, billfold, and cowboy boots. Scott called the police to report what they found in the pile. The following morning, Scott assembled a search party to search the woods around the house, where they found the victim's body. Scott said that a dead snake was found on top of the pile where the victim's body was found, and the Defendant later said that she had killed the snake by the horse barn. Scott returned to see the Defendant in the hospital to tell her that the victim was dead. When she did so, the Defendant acted "empty" and did not cry or scream at the news.

Scott identified suicide letters that her mother had written in March 2005, before the murder, which the victim gave to her. In those letters, the Defendant said to the victim, "I want to be cremated. This is my last wish. As hard as it will be for you, I am sorry to ask you, but please give my ashes to Ramsey. He knows what I want done with them. I don't want a service or flowers or any tears. I am sorry."

On cross-examination, Scott testified that the Defendant always kept their house clean, provided food for them to eat, and kept them nicely clothed. Scott said the Defendant moved out of the house when she and the victim got into a "big fight." Scott described the incident leading to her estrangement with the Defendant saying that, after the house the Defendant rented at this

time burned down on Mother's Day, Scott went to the site where the Defendant's house had been. There, she told the Defendant in front of the victim that the Defendant acted like a "whore" in Wal-Mart. Scott imitated the way her mother walked in Wal-Mart, and the Defendant asked Scott to leave. The two had not spoken from that day until she visited her mother in the hospital. Scott testified that the Defendant began a relationship with McCoy before the Defendant and the victim divorced in May of 2005. While the Defendant and the victim were having marital problems, the victim began to engage in social activities with his old friend Larry Sullivan. Scott said she searched the home after the Defendant was hospitalized and found no bullet holes.

Amanda Bryant testified that, in June 2005, she lived with the victim and the Defendant, who were her parents, even though her parents had recently divorced. The last time that she saw the victim alive was Sunday, June 5, 2005, at about 8:30 or 9:00 p.m. The next day, she saw the Defendant sweeping the carport. She noticed that the couch usually located on the carport was missing, and the Defendant said she dragged the couch away because it was covered in fleas. The Defendant had never mentioned before that there was a problem with the couch. Bryant later found the couch in the burn pile.

Bryant recalled she did not see the victim for the next two days, and the Defendant told her on Wednesday that the victim came home with a lot of money and tried to give her \$100. The Defendant said she refused the money, and the victim packed his things and said he would be gone for two weeks. The Defendant also indicated to Bryant that the victim said if he was not "back, to give the money for the house to his mama." Bryant later learned, on June 9, 2005, that the victim's truck had been found at one of his good friend's house. Bryant noticed that the windows of the truck were rolled down, despite the fact that it had been raining, that there were no keys in the truck, and that there was a liquor bag and some Tic Tacs in the truck. Bryant told the Defendant about the truck, and the Defendant said that she did not know, or care, about the location of the victim.

On June 10, 2005, Bryant came home and found the Defendant with "[h]er eyes . . . bugged out of her head and . . . shaking real[ly] bad." Bryant asked if the Defendant was okay, and the Defendant responded that she was fine. Bryant went into the restroom and saw that someone had thrown up there, and she saw two pills on the floor by the sink. Bryant got some clothes and then she left the house and went to the home of her boyfriend, Chad Martin. Bryant and Martin returned to check on the Defendant, only to learn the Defendant had overdosed and was being taken to the hospital.

Bryant went to the hospital to see the Defendant, and the Defendant appeared to recognize her. Bryant recalled that the Defendant said that she saw the victim's ghost at the foot of her bed. The Defendant also said, "[Y]ou will get the money," which she interpreted to mean that her father was no longer "around." After the Defendant was transferred to another hospital in Nashville, Bryant again went to see her, at which time the Defendant said, "[H]e shot the gun twice and I shot him." She was also talking about snakes and butterflies coming out of Bryant's eyes, but she did recognize Bryant, calling her by name.

Bryant said that she and her sister, Scott, returned to the Defendant's and the victim's house to see if they could find anything to help them figure out what had happened. They looked outside together and went down to the "burn pile" where they found the victim's boots, his wallet, a piece of his pants, and a blue lead rope that he usually kept in the barn. Bryant went downstairs, and she noticed that, since she had been there at around 12:30 p.m., the washer and dryer had been pulled out from the wall, and the board that blocked the crawl space had been removed. She saw the victim's rifle leaning against the washer and a couple of shells on the washer. Bryant recalled that the victim did not keep the rifle and the ammunition in the same place in the house, and only she, the victim, and the Defendant knew where they were kept. The following day, she returned to the house with her boyfriend and other people, and she learned that a search party had discovered her father's body.

On cross-examination, Bryant conceded that she rarely stayed at her parents' house. She reiterated that her mother said that she was going to burn the couch, but she did not see any drag marks from where the couch was located to the burn pile. Bryant recalled that the victim discussed going to Montana before his death. Bryant testified that the victim had been drinking during the time before his death and that she had argued with the victim when he came home after drinking. Bryant said that she had never seen her mother drive the truck. Bryant said that the Defendant did not struggle financially and had recently given her \$1200. She thought the Defendant would do anything for her and her sister.

Mark Evans, a Deputy Sheriff for the Van Buren County Sheriff's Department, testified that, on June 13, 2003, he responded to a call reporting the discovery of the victim's body. Deputy Evans contacted the District Attorney General's Office to assist, and then he secured the scene with Deputy Chris Russell.

Deputy Russell testified that he responded to the call in this case that there had been an attempted suicide at the Defendant's home. When he arrived, the Defendant's daughter, Amanda Bryant, informed him there was a .22 caliber rifle in the house, which he removed from the home in accordance with the police policy of removing weapons from the home of an attempted suicide victim. Deputy Russell took the rifle and placed it in the trunk of the car of the Defendant's other daughter, Amanda Scott. The following Sunday, he responded to another call from the Bryants' house, and, when he arrived, several family members and friends were there claiming that they had found the victim's remains in the burn pile. From the burn pile, he retrieved boots and a wallet that he bagged and turned into Deputy Rowland. On Monday, he responded to a call from the Bryants' home that human remains had been found. He confirmed the presence of human remains at the house and subsequently taped off the area. On cross-examination, the deputy testified that his investigation of this case began the day before he received the suicide call, when he was called to investigate the victim's truck. He said the victim's truck was found at the victim's friend's house, and, in the truck, he found a piece of paper indicating that the victim had meetings at a mental health facility.

Steve Turpin testified that he lived with Emma Scott, the Defendant's daughter, and he responded as a fire fighter to a call about the victim's truck on June 9, 2003. They found the truck at the victim's friend's house, which was a short distance from the victim's house. The

following day, he responded to a 911 call while he was riding in a car with Deputy Russell. At the house, Deputy Russell gave him a rifle from the house, which he put in the trunk of Scott's car. When they discovered the victim's remains on June 13, 2003, he got the rifle from the trunk of his car and gave it to Jason Rowland. On cross-examination, Turpin testified that he was at the Defendant's home after the Defendant was taken to the hospital and before the victim's body was found.

Jimmy McCormick testified that his friend asked him to help look for the victim, which he did with the assistance of Ricky Sanders. He said that he smelled what he thought to be a decaying human body. He followed that smell to a brush pile, and, near it, he saw a leg and foot. He then called 911. The 911 dispatcher testified that she received this 911 call at 10:34 a.m. on June 13, 2003.

Frances Marie Wheatley, the chief investigator for the Davidson County Medical Examiner's Office, testified that she went to the site of the victim's remains, which had been taped off by police. Wheatley testified about multiple photographs of the area around where the remains were found, and those pictures were displayed for the jury. The pictures depicted multiple tree limbs and skeletal bones lying in and around the brush pile. Wheatly recounted that the brush pile was covered with deer netting, and the netting had caught a snake, which subsequently died and was decomposing. In the brush pile, she found more skeletal remains, some of which were charred. Wheatley testified that she was able to remove the remains predominately in tact, but underneath the body she found other bones that had been pulled away from the body. Wheatley testified that she did not find the right lower leg or foot. The doctor gathered dirt from the scene for later examination, and she found three projectiles in the dirt. When she examined the body, she found that the victim's right femur had been fractured, along with both collarbones, the mandible, the scapula, and the left humerus. She also noticed charring on the jaw bone, the left leg, the left hand, and the pelvis. On cross-examination, Wheatley testified that she was not accusing the Defendant specifically of inflicting these injuries.

Mark Martin, an investigator with the Warren County Sheriff's Department, testified he assisted in this investigation. He found a blue lead rope for a horse near the burn pile, and he collected this rope. Investigator Martin also collected a bleach bottle, a jacket, a pair of coveralls, and a burned shovel from near the burn pile. On cross-examination, the investigator agreed that there was no blood found on the burned shovel. Further, he said that the couch, located ten or fifteen yards from the porch of the house, appeared heavy enough that he would not want to carry it by himself.

Jason Rowland, an investigator for the District Attorney's Office, testified that the victim's family members and friends were concerned when the victim's truck was found at a neighbor's house whose name was Hillis. He went with some other investigators to Hillis's house, and he noticed that the truck looked like it had been parked there for awhile. He noticed that the seat in the truck was pulled "way forward," but he and the other investigators did not find anything when they searched around the truck. They proceeded to the victim's house to talk to the Defendant. He knocked on the door several times but left after getting no response. At the house, Rowland noticed that the lawn needed mowing, and he learned later through his

investigation that the Defendant had purchased gasoline to mow the lawn, but she never mowed the lawn. He also noted that, on the back deck of the home, there was a candle sitting on a propane tank, which he opined could be dangerous. Rowland went back to look inside the truck, where he found two pill bottles, both belonging to the victim, in a bag on the front seat. He also found two appointment cards from Cheer Mental Health, at least one of which was for the Defendant.

Rowland identified multiple pictures of the crime scene that were taken after the victim's body was found. Additionally, he testified that the distance between the victim's body and the house was ninety-nine feet. He said there were multiple bleach bottles in the burn pile, and he said there were no bleach bottles inside the house. In a wastebasket in the laundry room, Rowland found two pillows that went with the couch in the burn pile. In a trash bag, Rowland found among other items a divorce decree dated May 24, 2005. On one of the back decks, Rowland noticed that some of the wood had mold or mildew growing on it and another part of the deck did not. He opined that bleach had been poured on the part of the deck that was clean. Inside the Defendant's car, he found a bag containing an unopened gallon of Clorox bleach. In the Defendant's purse, he found several receipts showing she purchased bleach from different stores. He also found an appointment card for a mental health appointment on June 9, 2005. In the burn pile, Investigator Rowland found portions of a bed sheet that had been burned around the edges, and the sheet appeared to be from the victim's bed. Rowland testified that he sifted through the dirt at the bottom of the burn pile to obtain a sample to be tested for accelerants.

On cross-examination, Rowland testified that he looked for bullet strikes or holes in the house but found none. He also did not see any fresh paint or any new carpet in the home. Rowland thought that the Defendant moved the victim's truck from their house to where it was later found. He also thought the Defendant moved the couch by herself from the house to the burn pile, and he opined she did so to cover the victim's body. Rowland said he found three gas containers at the house, but the couch in the burn pile was not covered in gasoline. Rowland said that, although he thought the Defendant dragged the couch, there were no drag marks from the house to the burn pile, but the rain and the grass growth could have covered any drag marks. Rowland testified that one witness told him that a man named Tim Guy had said that the victim parked his truck down the road at a friend's house to sneak up on the Defendant and catch her with another man. He attempted to talk with Guy several times but was unable to locate him.

Rowland testified that he believed that the Defendant killed the victim sometime during the week before June 13, 2005, and that she did so in order to get the house. He said that he thought the Defendant beat the victim with the shovel in order to break his bones. Rowland testified that one of the victim's legs was never found, and he did not know what the Defendant did with that leg. He thought the Defendant took the body to the burn pile, attempted to burn it, but was unable to fully burn the body. She therefore covered the body with the couch and then moved the body to where it was found at a later time. The couch had mud only on the back portion, and he thought it could have been dragged to the burn pile on that side.

Jim Hartman, an investigator with the Warren County Sheriff's Department, testified he assisted removing the victim's body from the brush pile. He also examined the couch in the

burn pile and did not find any insects on the couch. Investigator Hartman testified that he searched inside the house for blood or bullet holes but found neither. The investigator said that he found multiple .22 caliber brass shell casings near the surface of the burn pile. He opined that, because they were near the surface, they had not been there long. On cross-examination, he said that he did not send the shell casings to be tested for fingerprints.

Danny Bentley testified he met the victim through the victim's daughter, Pam. He had known the victim for three or four months, but they only socialized together at Pam's house. Bentley said he had only been to the Bryant residence once and that was after the victim's body had been found. He went there with Pam and her husband, and they left after she saw where the body had been discovered. On cross-examination, Bentley testified he lived close to a man named Larry Sullivan, and he knew Tim Guy. He agreed that Guy had a blackened eye around the time that the victim went missing.

Tim Guy testified he knew the victim through the victim's daughter, Pam, but he did not socialize with the victim. He said he had never been to the victim's home, and he had never been in a fight with the victim. Guy stated that the blackened eye he had around the time the victim went missing was not a result of a fight with the victim. Moreover, he denied any involvement in the victim's murder. Guy recalled a time when, after the victim's disappearance, he was at Bentley's house using methamphetamine and the two discussed what may have happened to the victim. On cross-examination, Guy testified that, at the time of the victim's death, the truck that Guy drove was painted "camouflage." Guy said he did not tell Bentley what happened to the victim, and he denied telling Bentley's girlfriend that the victim parked his truck down the road so that he could sneak up on the Defendant. He also denied saying that he would look for the victim about 200 feet from the victim's truck because "he probably got out [of the truck] and was going to sneak up on [the Defendant], and was drinking, and fell in one of those holes up there"

Lindsey Selby testified she knew the victim and the Defendant because she had been friends with their daughter, Amanda, for five or six years. She said she and Amanda took some target practice at the Bryants' home in 2005, and they were joined by the victim and the Defendant. She and the victim both shot a .9 millimeter, and the other two shot a .22 rifle. On cross-examination, Selby testified she lived with the Bryants for a period of time, and she never saw the Defendant act aggressively toward the victim. She stated she was not implicating the Defendant in this crime.

Cindy Thomas testified that she owns the Highway 30 Market, where the Defendant worked, and she also owned Westwood Market, where the victim worked at one time. The Defendant worked for her in July 2004. Thomas testified she had been to the Bryants' home multiple times, and, one time, she helped the Defendant arrange some furniture. While she was there, they decided the Defendant needed to move a buffet out of the room. Thomas told the Defendant the buffet was too heavy for the Defendant to move by herself, and the Defendant responded that it was "no big deal" and that she moved furniture by herself all the time. The Defendant told Thomas that she could put the furniture on a rug and "move it anywhere" she wanted to move it. On cross-examination, Thomas testified she was aware that the Defendant's

tires had been slashed while she was working.

Sharon Lawson testified she owned Campaign Market, where the Defendant also worked. She knew the Defendant from this and from going to church together. Lawson testified she and the Defendant had a conversation about divorce two or three years before the Defendant's trial, during which the Defendant said she would see the victim dead before she gave him the house. On cross-examination, Lawson testified that she did not call police because she did not think that the Defendant was actually going to kill the victim.

Several special agents, who worked as forensic scientists for the Tennessee Bureau of Investigations ("TBI"), testified about items from the crime scene that they tested. Hoyt Eugene Phillips, a TBI latent fingerprint expert, testified that he could not always obtain fingerprints from every crime scene he processed because gathering prints depends on the texture of the surface and the environmental conditions present. After processing multiple items in this case, Agent Phillips only found three latent fingerprints, which were on pieces of paper from the victim's truck. He could not identify or match any of the prints that he obtained. On cross-examination, Agent Phillips agreed he might have been able to obtain prints from the divorce papers found in the trash, but those were not submitted to him for testing. Brad Everett, in the serology DNA unit, tested several items and did not find the presence of blood on any of them. He explained exposure to fire would destroy any DNA evidence on an item. Randall Kirk Nelson, with the TBI microanalysis unit, testified as an expert in identification of accelerants and fire debris. He tested the victim's boots, underwear, pants and belt, and soil from the burn pile. On all the items tested, Agent Nelson found the presence of evaporated gasoline. Shelley Betts, a firearms identification expert, testified that she compared a Ruger automatic .22 long rifle with three fired bullets found under the victim's body. She determined conclusively that one of the bullets was fired from the rifle. The other two bullets were damaged by the fire, but she said the grooves were consistent with the rifle.

Dr. Hugh Berryman, a forensic anthropologist, testified he viewed the remains in this case on June 15, 2005. He said the remains still had soft tissue on them, which was removed before he examined the bones. He determined from his examination of the bones that the victim was a white male, approximately forty to sixty-five years old at the time of death. The doctor opined that the victim was approximately 5'11" tall. Dr. Berryman explained that there was trauma to the victim's bones from three gunshot wounds and in the form of blunt trauma, which he termed "sharp or hacking" trauma. The doctor explained the blunt trauma that he found, saying that there were multiple impacts to the body and describing those impacts in detail. He described how some of the impacts from the blade, which was 12/100 of an inch in width, slit open the bone and some of the hacking marks appeared to have been an attempt to dismember the body. The doctor also noted that some of the bones showed evidence of being burned. He also said that the bones of the lower right leg and right foot were missing completely. He determined that most of the blunt force trauma occurred around the time of the victim's death. Some of the blunt force trauma, the trauma to the ribs and the right thumb, occurred before death. These injuries, he said, could have been caused by a female or a male.

Dr. Stacy Turner, the medical examiner, testified that the victim died as a result of

multiple gunshot wounds. She also noted that the skeletal remains showed injuries from being struck with a blunt object and injuries from heat or fire. On cross-examination, Dr Turner said that there was enough evidence on the body that she successfully obtained a DNA sample.

Barney Evans, Chief Deputy for the Van Buren County Sheriff's Department, testified he went to the victim's house on June 10, 2005, to see if the Defendant had heard from the victim. When he walked up to the front door, the wooden door was open, and he could see the Defendant lying on the couch. He knocked on the door and she did not move, so he knocked harder until she awakened. Deputy Evans said the Defendant stumbled over a chair on her way to the door and fell to the floor, eventually opening the locked glass door. The Defendant's speech was slurred, and he thought that she may have had a stroke, so he called for an ambulance. When EMTs arrived, the Defendant told them that she had taken some pills. On cross-examination, Deputy Evans said he knocked on the door for fifteen or twenty minutes before he could arouse the Defendant. Deputy Evans agreed he had been to the Bryant home two weeks before to arrest the Defendant for filing a false police report about a domestic argument. That was, however, not the first time he had been called to the home because of fighting. Deputy Evans testified that he and the victim were friends, and he agreed that he never investigated Tim Guy.

Two nurses from the hospital where the Defendant was admitted testified about statements the Defendant made while hospitalized as the result of her overdose. Nurse Brenda Watts testified that the Defendant, who appeared to be hallucinating, looked at some visitors and told them that they needed to go find her husband because she thought that she killed him. On cross-examination, she also said that, shortly after making this statement, the Defendant went into a seizure and then into a coma and was admitted into the Intensive Care Unit. Nurse Susan Cathart, a nurse in the Intensive Care Unit, testified that, at around 12:30 a.m. that night, the Defendant began hallucinating and said that she wanted to get out of bed. The Defendant told Cathart that she saw spiders or "thousand-leggers," and the nurse told her there were no spiders and to lie back down. At around 4:00 a.m. the Defendant started yelling at her husband, the victim, telling him to "take the bullets out of [his] head and put [his] brains back in." The nurse asked the Defendant where her husband was, and the Defendant said he was in heaven as the result of a heart attack and had been there for three or four days. Cathart said that the Defendant became more and more aggressive and kept screaming that she was trying to get back to her husband, who was in heaven, and that her husband was an angel. The Defendant was upset with the nurse for not letting her get back to her husband. The Defendant attempted to pull her IV out and leave, used obscene language, and threatened to kill the nurse. The Defendant was subsequently transferred to another hospital for further care.

Based upon this evidence, the jury convicted the Defendant of one count of second degree murder and one count of abuse of a corpse.

II. Analysis

On appeal, the Defendant contends: (1) the evidence is insufficient to sustain either of her convictions; (2) the trial court erred when it failed to charge the jury on facilitation; and (3)

the trial court erred when sentencing her.

A. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to sustain either of her convictions. Concerning the second degree murder conviction, the Defendant contends first that there was insufficient proof that the killing was unlawful. Citing Tennessee Rule of Evidence 703, she asserts that the trial court improperly admitted testimony from a medical expert, Dr. Turner, who opined that the victim's death was a result of multiple gunshot wounds. She asserts that Rule 703 precludes this testimony because it was based upon mere speculation. Further, the Defendant asserts that, even if the State proved the killing was unlawful, it did not prove her identity as the perpetrator of this crime. She asserts that proof of her identity is based on admissions she made to nurses at the hospital that the jury was instructed to consider in context of the circumstances, i.e., her overdosed state. With respect to her abuse of a corpse conviction, the Defendant again asserts that the evidence did not sufficiently prove her identity as the perpetrator of this crime.

Initially, we note that the Defendant appears to be challenging evidentiary rulings, i.e., the admissibility of evidence. The record reflects that the Defendant failed to contemporaneously object at trial, thereby the Defendant "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). "When a party does not object to the admissibility of evidence, . . . the evidence becomes admissible notwithstanding any other rule of evidence to the contrary, and the jury may consider that evidence for its 'natural probative effects as if it were in law admissible.'" *State v. Smith*, 24 S.W.3d 274, 280 (Tenn. 2000) (quoting *State v. Harrington*, 627 S.W.2d 345, 348 (Tenn. 1981). "In the absence of a contemporaneous objection to proffered evidence in a criminal prosecution, the evidence is competent, and any complaint about the admission of such evidence is waived." *State v. Hopper*, 695 S.W.2d 530, 536 (Tenn. Crim. App. 1985). Thus, we will not address the Defendant's complaint.

With regard to the sufficiency of the evidence, our standard of review is, after considering the evidence in the light most favorable to the State, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). “Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *Smith*, 24 S.W.3d at 279). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000). Importantly, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. *Bland*, 958 S.W.2d at 659.

The Defendant was convicted of second degree murder, which is the knowing killing of another. T.C.A. § 39-13-210(a). A person acts knowingly with respect to the result of her conduct when she is aware that her conduct is reasonably certain to cause that result. T.C.A. § 39-13-106(2). Additionally, the identity of the perpetrator is an essential element of any crime and therefore must be proven by the State beyond a reasonable doubt. *State v. Thompson*, 519 S.W.2d 789, 793 (Tenn. 1975). The identity of an accused may be established either by direct evidence, circumstantial evidence, or a combination of the two. *Id.* The determination of identity is a question of fact for the jury to determine after consideration of all the evidence. *State v. Strickland*, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993).

The Defendant first contends that there was insufficient proof that the killing was unlawful. We cannot agree. There was expert medical testimony about the injuries suffered by the victim, including multiple gunshot wounds. Dr. Turner testified that the victim died as a result of these wounds. This is sufficient to prove that the killing was unlawful.

The Defendant next contends that, even if the killing was proved unlawful, there was insufficient proof of her identity as the perpetrator of this crime. As previously stated, a defendant's identity may be proven by circumstantial evidence. The evidence, in the light most favorable to the State, proves that the Defendant and the victim were divorced in May 2005. The Defendant and the victim were still contesting ownership of the marital home where they both still lived. On June 5, 2005, the Defendant and the victim left their home together in the victim's truck. Later that day, twenty to twenty-five gunshots were heard coming from behind the Bryants' house. The Defendant was then seen leaving the home driving the victim's truck. On June 6, 2005, the Defendant was seen purchasing gasoline twice and purchasing cleaning supplies, including bleach. When her daughter came home, she told her daughter that the victim had gone to Montana. The Defendant also said that she was taking a couch to the burn pile to burn it because it was infested with fleas. Witnesses saw a fire burning behind the Bryants' home.

On the June 7th, the Defendant, who had not shown up for work, was seen driving the victim's truck and purchasing more gasoline. The following day, the Defendant purchased more gasoline from a different gas station and more cleaning supplies. When asked where the victim was, she shrugged her shoulders and changed the subject, but she told her daughter that the victim had left for Montana. The Defendant did not show up to work again on June 9th, and the following day she attempted suicide. While in the hospital from her suicide attempt, the Defendant hallucinated about the victim being shot and about snakes biting her. Portions of the victim's clothing were found in the burn pile underneath the couch that the Defendant said she was going to burn, and the victim's body was found a short distance away in a brush pile on top of which rested a dead snake. The victim died as a result of multiple gunshot wounds. One of the bullets found underneath the victim's body was positively matched as coming from a rifle found in the Bryants' home and to which only the victim, the Defendant, and Amanda Bryant had access. It was found near some scattered shells and near a trashcan in which the Bryants' divorce decree was thrown. Investigators found in the Defendant's purse multiple receipts for bleach and the deck appeared to have had bleach poured on it. When the Defendant was told in the hospital that the victim was killed, she did not cry or act surprised.

These facts, while circumstantial, are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *Smith*, 868 S.W.2d at 569. We conclude that they are sufficient to sustain the Defendant's conviction for second degree murder. Similarly, we conclude that they are also sufficient to prove the Defendant's identity with respect to her conviction for abuse of a corpse. A person commits this offense with she knowingly physically mistreats a corpse "in a manner offensive to the sensibilities of an ordinary person" or disposes of a corpse in a manner known to be in violation of a law. T.C.A. § 39-17-312 (2006). The victim's corpse was without question abused in that it was burned, partially dismembered with a shovel in an apparent attempt to get it to burn, and then moved to a brush pile, where it was found. As previously stated, the State proved by circumstantial evidence the Defendant's identity with respect to these offenses. She is, therefore, not entitled to relief on this issue.

B. Facilitation Instruction

The Defendant next contends that the trial court erred when it failed to instruct the jury on facilitation. The Defendant points out that there was evidence that, on Wednesday June 8, 2005, there were multiple loud voices coming from the Bryant residence. The following day, the victim's truck was found. Further, the Defendant points out that other people had a motive to kill the victim, including her lover and Guy, who had a black eye around the time the victim disappeared. Additionally, she asserts that the fact there were different size bullet holes in the victim proved that multiple actors were involved. The Defendant states that a jury could have inferred from this evidence that she facilitated others in committing second degree murder.

The Defendant concedes that she did not request this instruction, which would result in waiver absent our finding plain error. *See* T.C.A. § 40-18-110(c). Issues that rise to the level of plain error lie within the sound discretion of the appellate court and may be considered: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process, prevent manifest injustice, or to do substantial justice. *See* Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b); *State v. Adkisson*, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994). In *Adkisson*, this Court stated that the following factors should be considered by an appellate court when determining whether an error constitutes a “plain error”: (a) the record must clearly establish what occurred at the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issues for tactical reasons; and (e) consideration of the issue is “necessary to do substantial justice.” *Adkisson*, 899 S.W.2d at 641-42 (citations omitted). Our Supreme Court characterized the *Adkisson* test as a “clear and meaningful standard” and emphasized that each of the five factors must be present before an error qualifies as plain error. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000).

In the case under submission, we will first consider whether a clear and unequivocal rule of law has been breached. The question of whether a given offense should be submitted to the jury as a lesser-included offense is a mixed question of law and fact. *State v. Rush*, 50 S.W.3d 424, 427 (Tenn. 2001) (citing *State v. Smiley*, 38 S.W.3d 521 (Tenn. 2001)). The standard of review for mixed questions of law and fact is de novo with no presumption of correctness. *Id.*; *see State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). The trial court has a duty “to give a complete charge of the law applicable to the facts of the case.” *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (citing *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *see* Tenn. R. Crim. P. 30).

The Defendant herein was indicted on charges of first degree murder, and she was convicted on charges of second degree murder. Facilitation occurs when a person, “knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under T.C.A. § 39-11-402(2) . . . knowingly furnishes substantial assistance in the commission of the felony.” T.C.A. § 39-11-403(a) (2006).

While facilitation is a lesser-included offense, trial courts are not required to instruct the jury on all lesser-included offenses of the charged offense and must only instruct the jury on a

lesser-included offense if the evidence introduced at trial is legally sufficient to support a conviction for the lesser offense. *See Burns*, 6 S.W.3d at 464. Accordingly, the determination of whether the evidence warrants a lesser-included offense instruction is a two-step analysis. First, the trial court must determine whether an offense is a lesser-included offense under the *Burns* test; then, it must determine whether a charge is justified by the evidence. *State v. Ely*, 48 S.W.3d 710, 722 (Tenn. 2001). The second step of this analysis requires a determination that: “(1) reasonable minds could accept the offense as lesser-included; and (2) the evidence is legally sufficient to support a conviction for the lesser-included offense.” *State v. Wilson*, 92 S.W.3d 391, 394 (Tenn. 2002). “In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence.” *Burns*, 6 S.W.3d at 469.

We conclude that the proof in this case did not support the lesser charge of facilitation to commit second degree murder. The evidence pointed out by the Defendant (that there were voices coming from the house during the night before the victim’s truck was discovered, that there were other people with a motive to kill the victim, and that the victim’s gunshot wounds were from different caliber weapon) when viewed in the light most favorable to the existence of a lesser-included offense, is not sufficient to warrant an instruction of facilitation. First, there was no evidence to support the Defendant’s contention that the gunshot wounds were from a different caliber weapon. The Defendant, in her brief, cites to a picture submitted though Dr. Berryman that appears to depict different size holes in the bones. This does not sufficiently establish that the holes in the bones were created by different weapons. Further, there was simply no evidence presented that the Defendant, knowing that another intended to commit second degree murder, but without the intent required for criminal responsibility, knowingly furnished substantial assistance in the commission of the felony. Therefore, the trial court did not err when it failed to instruct the jury on facilitation. Accordingly, an unequivocal rule of law has not been breached and plain error does not necessitate further review. The Defendant is not entitled to relief on this issue.

C. Sentencing

The Defendant finally contends that the trial court erred when sentencing her. The exact date of this crime remains undetermined. It occurred sometime during the week of June 5, 2005. The trial court made no determination of the date upon which this offense occurred. Offenses that occurred before June 7, 2005, are subject to the 1989 Sentencing Act. For offenses occurring on or after June 7, 2005, the new sentencing statute, enacted that day, governs sentencing. *See* 2005 Tenn. Pub. Acts ch. 353 § 18, 22. The General Assembly provided that a defendant whose sentencing takes place after June 7, 2005, but who committed the offense before June 7, 2005, and subsequent to July 1, 1982, may elect to be sentenced under the new act by executing a waiver of her *ex post facto* protections. *See* 2005 Tenn. Pub. Acts ch. 353 § 18; T.C.A. § 40-35-102 (2006), Complier’s Notes.

The trial court sentenced the Defendant under the old law. However, because the trial court made no determination on the record about the date of the offense, because the record is not clear about when that offense occurred, and because that date is relevant to which sentencing

statute applies, we must vacate the sentence and remand this case for re-sentencing. On remand, the trial court should determine which law applies, if the offenses occurred before June 7, 2005, and ensure that the Defendant properly executes a waiver of her *ex post facto* protections if she wishes to be sentenced under the amended sentencing statutes. See T.C.A. § 40-35-210, Complier's Notes.

III. Conclusion

Based on the foregoing reasoning and authority, the Defendant's convictions are affirmed. The sentencing order is vacated, and the case is remanded for further proceedings consistent with this opinion.

ROBERT W. WEDEMEYER, JUDGE